Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

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ROSALYN MCNISH,

PETITIONER,

VS.

STATE OF ALABAMA

RESPONDENT.

==========

APPEAL FROM:

SUPREME COURT OF ALABAMA
CASE NO.: 1021220
COURT OF CRIMINAL APPEALS OF ALABAMA
CASE NO.: 98-0654
CIRCUIT COURT OF PIKE COUNTY, ALABAMA
CASE NO.: CC 97-282/283/284/285

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

==========

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101 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

II. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE GUILTY FINDINGS.

PARTIES

PETITIONER

Rosalyn McNish

RESPONDENT

State of Alabama

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

NO. _____

ROSALYN MCNISH,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The Petitioner, Rosalyn McNish, respectfully prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court entered on August 15, 2003.

OPINIONS BELOW

The Supreme Court of Alabama entered its decision on August 15, 2003 denying

Petitioner's Petition for Writ of Certiorari which sought to set aside her November 16, 1998 convictions and sentences. A copy of the appellate decisions are printed in Appendixes A, B, C and D.

JURISDICTION

On August 15, 2003, the Supreme Court of Alabama entered its decision affirming the Alabama Court of Criminal Appeals' March 14, 2003 and February 4, 2000 decisions which denied Petitioner's appeal to set aside her November 16, 1998 convictions and sentences. (Appendixes A, B, C and D). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI, Petitioner's right to effective

assistance of counsel, Amendments V and XIV, Petitioner's right to the equal protection of the law and the right to due process.

STATEMENT OF THE CASE

On November 16, 1998, Petitioner was tried by a jury and convicted of two counts of conspiracy to commit theft of property and two counts of theft of property first degree. On December 18, 1998, Petitioner was sentenced to serve five (5) years in prison for each conviction, Case Nos. CC 97-282 and CC 97-283 to run concurrently, and Case Nos. CC 97-284 and CC 97-285 to run concurrently, but otherwise, consecutively.

The Court of Criminal Appeals affirmed the convictions and sentences on February 4, 2000. An application for Rehearing was filed on February 18, 2000, and overruled March 17, 2000. A Petition

for Writ of Certiorari to the Supreme Court of Alabama was filed on March 30, 2000, was granted on February 7, 2003, and the case was remanded to the Criminal Appeals Court. On March 14, 2003, the Criminal Appeals Court affirmed the convictions and sentences. An Application for Rehearing was filed on March 28, 2003, and was overruled on April 4, 2003. A Petition for Writ of Certiorari to the Supreme Court of Alabama was filed on April 18, 2003, and was denied on August 15, 2003. On November 13, 2003, Petitioner filed this Writ of Certiorari in the U.S. Supreme Court.

REASONS FOR GRANTING THE WRIT

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION GUARANTEES EVERY CRIMINAL DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND THE FIFTH AND FOURTEEN AMENDMENTS GUARANTEES EVERY CITIZEN THE RIGHT NOT TO BE DEPRIVED OF HER LIBERTY WITHOUT DUE PROCESS AND GUARANTEES THE EQUAL PROTECTION OF THE LAW.

STATEMENT OF THE FACTS

Attorney Brandon Coots was appointed to represent Petitioner for the trial and appeal of this case. On November 14, 1998, when requesting a continuance from the scheduled November 16, 1998 trial date, Attorney Coots, inter alia, stated:

> "...And my biggest concern is, Your Honor -- I don't know if this has, even, an equitable question in it. But since I am just beginning, I require more time to get ready. I'm having to do a lot of case law research, and I'm having to do things that these other gentlemen probably aren't having to do. I'm having to go back and study up on the Rules of evidence and such, and I just need more time.
>
> Also, my client hasn't even talked with me. I've called her several times. I've left messages. I need more time to prepare for this case, Your Honor." (CR. 10).

Petitioner's motion for continuance was denied and the trial proceeded two (2) days later on November 16, 1998.

Willie Joe Brown, one of the alleged

victims, testified that he had never met Petitioner Rosalyn McNish, that she had never made any promises to him, never offered him any services, (CR. 161-162), he never gave her any money, never gave her any checks, and Petitioner Rosalyn McNish never made any promises to him about financial arrangements. (CR. 328).

Stephanie Brown, the wife of Willie Joe Brown, testified she met Petitioner Rosalyn McNish once. Ms. Brown stated Petitioner Rosalyn McNish never made any representations to her about Financial Services and never told her where to invest her money. (CR. 239). She stated she never gave any checks to Petitioner Rosalyn McNish, she never conducted any business through her, and that all the business was conducted through Demetrius McNish and not through Petitioner Rosalyn McNish. (CR. 252). She further stated

she did not know Petitioner Rosalyn McNish's signature. (CR. 212).

The prosecution offered two checks into evidence that were payable to Petitioner Rosalyn McNish, and the signature "Rosalyn McNish" appeared on the back of the checks. The prosecution presented no evidence that the aforestated checks were signed by Petitioner Rosalyn McNish, nor presented any evidence that she had any knowledge of the said checks.

At the conclusion of the prosecution's case, Petitioner's appointed attorney Coots made a motion for judgment of acquittal on the grounds that the State had not proven the case beyond a reasonable doubt and had not proven venue. (CR. 270-271). The motion was denied. Subsequent to the Trial Judge instructing the jury, Attorney Coots informed the Court that he was satisfied with the

instructions. (Cr. 411)

Petitioner was convicted of two counts of conspiracy to commit theft of property and two counts of theft of property, 1st degree. (CR. 422-423). She was sentenced to serve five (5) years in prison for each conviction, Case Nos. CC 97-282 and CC 97-283 to run concurrently, and Case Nos. CC 97-284 and CC 97-285 to run concurrently, but otherwise, consecutively. (CR. 3321). Petitioner appealed her convictions and sentences.

In his brief to the Alabama Court of Criminal Appeals, Petitioner's appointed Counsel Coots, raised the following issues for review:

1. The Petitioner was denied her constitutional right to effective assistance of counsel.

2. Trial Court erred in not granting a motion for mistrial due to contact by a witness of the State

with a member of the jury.

3. The Trial Court erred in not granting the Petitioner's motion for Judgment of Acquittal.

4. The Trial Court erred in not sustaining the objection of Counsel as to the chain of custody of evidence and the proper predicate being laid prior to admission of evidence.

5. The Trial Court erred in not granting a judgment of acquittal where a fatal variance has occurred.

6. The Trial Court erred to properly charge the jury as to the Defendant's right to testify.

Subsequent to the Alabama Criminal Court of Appeals' February 4, 2000 opinion which denied Petitioner Rosalyn McNish's appeal, Petitioner Rosalyn McNish retained new counsel to represent her in furtherance of her appeal.

ARGUMENT

I

PETITIONER WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

As indicated by the Alabama Criminal Court of Appeals in its February 4, 2000 opinion in this case, to prevail on an ineffective assistance of counsel claim, a Petitioner must show that Counsel's performance was deficient and that Counsel's deficient performance prejudiced her, citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Brown v. State, 663 So.2d. 1028, (Ala.Cr.App. 1995).

Attorney Brandon Coots was appointed to represent Petitioner for the trial and appeal of this case. On November 14, 1998, when requesting a continuance from the scheduled November 16, 1998 trial date, Attorney Coots, inter alia, stated:

> "...And my biggest concern is, Your Honor -- I don't know if this has, even, an equitable question in it. But since I am just beginning, I require more time to get ready. I'm having to do a lot of case law research, and I'm having to do things

> that these other gentlemen probably aren't having to do. I'm having to go back and study up on the Rules of evidence and such, and I just need more time.
>
> Also, my client hasn't even talked with me. I've called her several times. I've left messages. I need more time to prepare for this case, Your Honor."
>
> (CR. 10).

Petitioner's motion for continuance was denied and the trial proceeded two (2) days later on November 16, 1998.

As indicated by Attorney Coots, he was not prepared to try Petitioner Rosalyn McNish's case. As indicated by Attorney Coots, two (2) days prior to the trial, he still had never spoken to Petitioner Rosalyn McNish.

In ruling on the issues set forth by Attorney Coots in his Appellate Brief for Petitioner Rosalyn McNish, the Alabama Court of Criminal Appeals ruled, inter alia, that;

1. Petitioner failed to state with

specificity as to how she received ineffective assistance of Counsel.

2. Petitioner failed to preserve the issue of a mistrial allegedly resulting from a juror speaking to one of the State's witnesses.

3. Petitioner failed to preserve the issue of the admission of canceled checks into evidence.

4. Petitioner failed to preserve the issue of an alleged Jury Instruction pertaining to Petitioner's right to testify.

5. Petitioner failed to preserve the issue of an alleged fatal variance between the charges and the evidence.

6. Petitioner failed to preserve the issue of a motion for acquittal.

In addition to the foregoing deficient performance on the part of Attorney Coots, Attorney Coots failed to

raise the issue in Petitioner Rosalyn McNish's appeal that there was insufficient evidence to sustain the guilty findings. The Alabama Court of Criminal Appeals reversed the conspiracy and theft convictions of Doris McNish in its February 4, 2000 opinion in this case. The facts relating to Petitioner Rosalyn McNish mirror those pertaining to Doris McNish. A discussion of the similarity of facts between Doris McNish and Petitioner Rosalyn McNish is set forth under Argument II and is specifically incorporated as part of this issue. The facts clearly show there was insufficient evidence to sustain the guilty findings.

As a result of Attorney Coots' deficient performance in failing to preserve the issues set forth above for Appellate Review, and his failure to raise the issue that there was insufficient

evidence to sustain the guilty findings, Petitioner Rosalyn McNish was substantially prejudiced, and is entitled to relief on this claim. Strickland v. Washington, supra; Brown v. State, supra.

ARGUMENT II

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE GUILTY FINDINGS.

The Alabama Court of Criminal Appeals reversed the conspiracy and theft convictions of Doris McNish in its February 4, 2000 opinion in this case. The facts relating to Petitioner Rosalyn McNish mirror those pertaining to Doris McNish. In reference to Doris McNish, the Appellate Court states that Mr. Brown testified that he had met Doris McNish on two occassions and that they just spoke and were friendly. He testified that Doris McNish never made any representations to him. In reference to

Petitioner Rosalyn McNish, Mr. Brown testified that he had never met Petitioner Rosalyn McNish, that she had never made any promises to him, never offered him any services, (CR. 161-162), he never gave her any money, never gave her any checks, and Petitioner Rosalyn McNish never made any promises to him about financial arrangements. (CR. 328). The Appellate Court states that Mrs. Brown testified that she had never met Doris McNish, that she had seen her only once in a limousine with Demetrius when he had come to her house to see Mr. Brown, and that Doris McNish never made any representations to her. In reference to Petitioner Rosalyn McNish, Mrs. Brown testified she met Petitioner Rosalyn McNish once, that Petitioner Rosalyn McNish never made any representations to her about Financial Services, never told her where to invest

her money, (CR. 239), that she never gave any checks to Petitioner Rosalyn McNish, never conducted any business through her, and that all the business was conducted through Demetrius McNish and not through Petitioner Rosalyn McNish. (CR. 252). Mrs. Brown further stated she did not know Petitioner Rosalyn McNish's signature. (CR. 212). The Appellate Court states that the State presented seven checks that showed Doris McNish as the payee and that were signed "Doris McNish." However, the State did not present any evidence that Doris McNish ever had any knowledge of the checks or that Doris McNish actually signed the checks. In reference to PetitionerRosalyn McNish, the prosecution offered two checks into evidence that were payable to Petitioner Rosalyn McNish, and the signature "Rosalyn McNish" appeared on the

back of the checks. The prosecution presented no evidence that the aforestated checks were signed by Petitioner Rosalyn McNish, nor presented any evidence that she had any knowledge of the said checks. The Appellate Court states that a bank statement for a savings account owned by Doris McNish and Petitioner Rosalyn McNish reflected deposits with dates and amounts that corresponded to the dates and amounts on some of the checks that the Browns had given Demetrius. However, the Appellate Court concluded that nothing showed Doris McNish had any knowledge that the money was being deposited into the account or that she withdrew any of those funds. Therefore, the Appellate Court concluded that the State did not present sufficient evidence to support Doris McNish's theft and conspiracy convictions, citing Stinson v. State, 631 So.2d 831 (Ala. 1992);

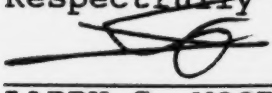
Greer v. State, 563 So.2d 39 (Ala.Cr.App. 1990). Accordingly, the Appellate Court reversed Doris McNish's convictions and sentences and rendered a judgment in her favor. In reference to Petitioner Rosalyn McNish, the same bank statement for a savings account owned by Doris McNish and Petitioner Rosalyn McNish alluded to by the Appellate Court, reflected deposits with dates and amounts that corresponded to the dates and amounts on some of the checks that the Browns had given Demetrius. However, nothing showed Petitioner Rosalyn McNish had any knowledge that the money was being deposited into the account or that she withdrew any of those funds. Based on the foregoing evidence, the jury could not have reasonably concluded Petitioner either committed or aided and abetted Demetrius McNish in committing the charged

offenses. Therefore, as the Appellate Court concluded in Doris McNish's appeal, the State did not present sufficient evidence to support Petitioner Rosalyn McNish's theft and conspiracy convictions. Stinson v. State, supra; Greer v. State, supra. Accordingly, as the Appellate Court reversed Doris McNish's convictions and sentences and rendered a judgment in her favor, Petitioner Rosalyn McNish's convictions and sentences are due to be reversed and a judgment rendered in her favor.

CONCLUSION

For all the foregoing reasons, and those related thereto, Petitioner Rosalyn McNish's convictions and sentences are due to be reversed and a judgment rendered in her favor.

Respectfully submitted,



LARRY C. MOORER
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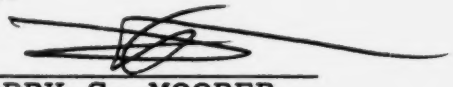
107 North Jackson St.
Mobile, Alabama 36602
(251) 432-0002

CERTIFICATE OF SERVICE

I certify that I have on this 13th day of November, 2003, served a copy of the foregoing Brief for Writ of Certiorari upon the Alabama Attorney General's Office, Alabama State House, Criminal Appeals Division, 11 South Union St., Montgomery, AL 36130, by U.S. Mail, postage prepaid.



LARRY C. MOORER

IN THE SUPREME COURT OF ALABAMA

August 15, 2003

1021220

Ex parte Rosalyn McNish. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Demetrius Antone McNish and Doris McNish and Rosalyn McNish v. State of Alabama) (Pikel Circuit Court: Demetrius Antone McNish #'s (97-246-253, 97-255 thru 267, 97-288 thru 293); Doris McNish #'s (97-268 thru 281); Rosalyn McNish #'s (97-282 thru 285); Criminal Appeals : CR-98-0654).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

Writ Denied - No Opinion

HOUSTON, J. - Moore, C.J., and Lyons, Johnstone, and Woodall, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this *15th* **day of** *August,* *2003*

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

Appendix A

/tr

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. 0. Box 301555
Montgomery, AL 36130-1555

RELEAS_

CKY" McMILLAN
Judge
L COBB
. W. BASCHAB
IAW
I WISE

MAR 14 2003
CLERK
ALA COURT CRIMINAL

Lane W. Mann
Clerk
Wanda K. Ivey
Assistant Clerk
(334) 242-4590
Fax (334) 242-4689

MEMORANDUM

On Remand from the Alabama Supreme Court

CR-98-0654 Pike Court CC-97-246, CC-97-247, CC-97-248, CC-97-249, CC-97-250, CC-97-251, CC-97-252, CC-97-253, CC-97-255, CC-97-256, CC-97-257, CC-97-258, CC-97-259, CC-97-260, CC-97-261, CC-97-262, CC-97-263, CC-97-264, CC-97-265, CC-97-266, CC-97-267, CC-97-288, CC-97-289, CC-97-290, CC-97-291, CC-97-292, CC-97-293, CC-97-268, CC-97-269, CC-97-270, CC-97-271, CC-97-272, CC-97-273, CC-97-274, CC-97-275, CC-97-276, CC-97-277, CC-97-278, CC-97-279, CC-97-280, CC-97-281, CC-97-282, CC-97-283, CC-97-284, and CC-97-

Demetrius Antone McNish, Doris McNish, and Rosalyn McNish v. State of Alabama

Baschab, Judge.

Appendix B

On February 4, 2000, we affirmed Demetrius McNish's convictions and sentences for 13 counts of first-degree theft of property, 13 counts of conspiracy to commit first-degree theft of property, and one count of second-degree theft of property; affirmed Rosalyn McNish's convictions and sentences for two counts of first-degree theft of property and two counts of conspiracy to commit first-degree theft of property; and reversed and rendered Doris McNish's convictions and sentences for seven counts of first-degree theft of property and seven counts of conspiracy to commit first-degree theft of property. See McNish v. State, [Ms. CR-98-0654, February 4, 2000] So. 2d (Ala. Crim. App. 2000). On February 7, 2003, the Alabama Supreme Court reversed our judgment affirming Rosalyn's convictions and remanded the case with instructions that this court "address the merits of Rosalyn's claim that the evidence was insufficient to support her

convictions." Ex parte McNish, [Ms. 1991233, February 7, 2003] So. 2d (Ala. 2003).

In our previous opinion, we noted:

"Rosalyn McNish was convicted of two counts of first-degree theft of property, violations of §13A8-3, Ala. Code 1975 (cases CC-97-283 and CC-97-285); and two counts of conspiracy to commit first-degree theft of property, violations of §§13A-4-3 and 13A8-3, Ala. Code 1975 (cases CC-97-282 and CC-97-284). The trial court sentenced her to serve five years in prison for each conviction.

"In June 1995, Willie Joe Brown, a resident of Pike County, Alabama, won $14,000,000 in the Florida lottery. Shortly thereafter, Demetrius telephoned Mr. Brown's home and talked to Stephanie

Brown, Mr. Brown's wife. Demetrius told her that he represented 'a lot' of lottery winners all over the county and that he thought he could help Mr. Brown manage his winnings to earn more money. Mrs. Brown spoke to Demetrius on the telephone on several occasions. On one occasion, he told her that he would be in the area where they lived and asked if he could come to their home. The Browns agreed, and Demetrius went to their house on June 25, 1995.

Demetrius told the Browns that he was a consultant, and he gave them his business card. He also showed them newspaper clippings from when he had run for public office. Mr. Brown testified that he and Demetrius discussed a business venture by which Mr. Brown would give Demetrius money to purchase discounted civil judgments. Mr. Brown agreed to the venture and arranged for Mrs. Brown to meet Demetrius the following morning to set up a $50,000 account for Demetrius and his business, Executive Services. When Mrs. Brown arrived at the First Alabama Bank in Troy, Alabama, the following morning, Demetrius was there with his sister, Rosalyn. After Mrs. Brown had written the $50,000 check to Executive Services, Demetrius explained that Executive Services did not have an account at that bank, but his sister did. Therefore, he wanted to deposit the money into Rosalyn's savings account and later transfer the money to Executive Services' account. Mrs. Brown added Rosalyn as a payee, and Demetrius deposited the check. On that same day, $27,122.60 was withdrawn from Rosalyn's account. The defense introduced a receipt for a $27,122.60 certified check dated June 26, 1995, that was made payable to the Social Security Administration. 'Executive

Services' and 'R. McNish' appeared on the remitter line of the receipt. Mr. Brown testified that he owed $27,122.60 to the Social Security Administration for the overpayment of Social Security benefits and that he had discussed this debt with Demetrius.

"The Browns gave Demetrius 14 checks in addition to the initial $50,000 check.[4] The total amount of those checks was $218,400. Either Mr. Brown or Mrs. Brown identified their signature on each check. Both testified that the date, payee, amount, and memorandum lines were blank when they gave those checks to Demetrius. Two of the checks were payable to Rosalyn McNish, and the signature 'Rosalyn McNish' appeared on the back of the check. Seven of the checks were made out to Doris McNish, Demetrius' and Rosalyn's mother, and the signature 'Doris McNish' appeared on the back of the checks. Four of the checks were payable to Demetrius McNish, and the final check was payable to 'Cash.' The signature 'Demetrius McNish' appeared on the back of these checks. One of the checks was dated May 20, 1995. However, Mrs. Brown testified that neither she nor her husband had a checking account before he won the lottery in June 1995.

"The memorandum lines on two of the checks contained language indicating that the money was a loan. However, Mr. Brown denied that he had agreed to loan Demetrius money to use for personal and business expenses. Rather, he testified that the money from the checks was to be used solely for purchasing judgments. Mr. Brown testified that he never received any judgments from Demetrius and that Demetrius did not give him any proceeds from any judgments. He testified that he did receive two $1,000 cashier's checks from Demetrius, but he did not know what the money was for. Mr. Brown also received two checks from Demetrius that were written on Rosalyn's checking account and contained the signature 'Rosalyn McNish.' Both checks contained notations on the memorandum line that they were loan payments and both were returned for nonsufficient funds. Mr. Brown also received two checks that were written on the account of Cecilia A. Primm and contained the notation 'loan payment' on the memorandum lines. However, Mr. Brown testified that he did not know Cecilia Primm and he had not loaned her any money. Both checks were returned because the account was closed. There was also testimony that Demetrius assisted the Browns in paying off

existing bills and was involved in the purchase of their new home and automobile insurance. However, the extent of Demetrius' involvement in these transactions was not clear.

"Mr. Brown telephoned Demetrius when did not receive any money from him. He testified that he called Demetrius three or four times and left messages on Demetrius' voice mail. He also gave

> Demetrius the telephone number for his beeper, which had a toll-free telephone number and voice mail. Nevertheless, Demetrius never returned his telephone calls. Mr. Brown then went to Mobile to find Demetrius' office. He found the address where Demetrius had told him the business was located, but there was no such business there. Instead, he found a building attached to a hotel or a motel, but none of the McNishes worked there. Mr. Brown also went to Prichard to look for Demetrius. While there, he talked with Doris and told her that Demetrius was going to get into trouble over the checks. According to Brown, he was talking about the

checks written on Rosalyn's account that had been returned for nonsufficient funds.

"Mrs. Brown testified that, although her husband told her something about Demetrius using the money to buy judgments, she was not familiar with the terms of the agreement between him and Demetrius. Mrs. Brown also testified that she accompanied Demetrius to the bank on several occasions and gave him checks as her husband directed.

"[4] None of the appellants were charged with taking the $50,000 from the initial check."

McNish v. State, [Ms. CR-98-0654, February 4, 2000]--So. 2d (Ala. Crim. App. 2000) (footnote omitted).

Rosalyn argues that the State did not present sufficient evidence to support her convictions.

"The theft of property which exceeds $1,000.00 in

value, or property of any value taken from the person of another, constitutes theft of property in the first degree."

§13A-8-3(a), Ala. Code 1975.

"A person commits the crime of theft of property

if he:

(2) Knowingly obtains by deception control over the property of another, with intent to deprive the owner of his property."

§13A-8-2, Ala. Code 1975.

"A person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one or more of such persons does an overt act to effect an objective of the agreement."

§13A-4-3(a), Ala. Code 1975. Alabama's accomplice liability statute provides:

"A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense:

"(2)He aids or abets such other person in committing the offense...."

§13A-2-23, Ala. Code 1975.

"The words 'aid and abet' encompass all assistance by acts, words of encouragement, or

support, or presence, actual or constructive, to render assistance should it become necessary. Wright (v. State, 494 So. 2d 936 (Ala. Crim. App. 1986)]; Sanders v. State, 423 So. 2d 348 (Ala. Cr. App. 1982). Actual participation in the crime need not be proved by positive testimony to convict someone of aiding and abetting. 'The jury is to determine whether the appellant's participation exists and the extent of it from the conduct of the parties and all the testimony presented.' Walls v. State, 378 So. 2d 1186, 1191 (Ala. Cr. App. 1979), cert. denied, Ex parte Walls, 378 So. 2d 1193 (Ala. 1980) . Such facts as the defendant's presence in connection with his companionship, and his conduct at, before and after the commission of the act, are potent circumstances from which participation may be inferred."

Henry v. State, 555 So. 2d 768, 769 (Ala. Crim. App. 1989).

"Any word or act

> contributing to the commission of a felony, intended and calculated to incite or encourage its accomplishment, whether or not the one so contributing is present, brings the accused within the statute that makes any person concerned in the commission of a felony, directly or indirectly, a principal. ... No particular acts are necessary to make one an aider and abettor; the common enterprise or adventure may have been entered into on the spur of the moment without prearrangement or participation."

Scott v. State, 374 So. 2d 316, 318-19 (Ala. 1979). And,

> "'[w]here the evidence is conflicting as to the defendant's connection as an accomplice or co-conspirator, a jury question is presented.' Sanders v. State, [423 So. 2d 348 (Ala. Crim. App. 1982)], citing Watkins v. State, 357 So. 2d 156, 160 (Ala. Crim. App. 1977), cert. denied, 357 So. 2d 161 ([Ala. 1978) . "

Henry, 555 So. 2d at 770. Also,

> "' [i] ntent, being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence.' McCord v. State, 501 So. 2d 520, 528-529 (Ala. Crim. App. 1986), quoting Pumphrey v. State, 156 Ala. 103, 47 So. 156 (1908).[11]

French v. State, 687 So. 2d 202, 204 (Ala. Crim. App. 1995), rev'd on other grounds, 687 So. 2d 205 (Ala. 1996).

> "In deciding whether there is sufficient evidence to support the verdict of the jury and the judgment of the trial court, the evidence must be reviewed in the light most favorable to the prosecution. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979). Conflicting evidence presents a jury question not subject to review on appeal, provided

the state's evidence establishes a prima facie case. Gunn v. State, 387 So. 2d 280 (Ala. Cr. App.), cert. denied, 387 So. 2d 283 (Ala. 1980). The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the appellant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, the appellate court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983); Thomas v. State. When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for a judgment of acquittal by the trial court does not constitute error. Young v. State, 283 Ala. 676, 220 So.

2d 843 (1969); Willis v. State."

Breckenridge v. State, 628 So. 2d 1012, 1018 (Ala. Crim. App. 1993) .

"'In determining the sufficiency of the evidence to sustain the conviction, this Court must accept as true the evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider the evidence in the light most favorable to the prosecution.' Faircloth v. State, 471 So. 2d 485, 489 (Ala. Cr. App. 1984), affirmed, Ex parte Faircloth, [471] So. 2d 493 (Ala. 1985).

• '"The role of appellate courts is not to say what the facts are. Our role, ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision to the jury." Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978). An appellate court may interfere with the jury's verdict only where it

reaches "a clear conclusion that the finding and judgment are wrong." Kelly v. State, 273 Ala. 240, 244, 139 So. 2d 326 (1962). ... A verdict on conflicting evidence is conclusive on appeal. Roberson v. State, 162 Ala. 30, 50 So. 345 (1909).

• [W] here there is ample evidence offered by the state to support a verdict, it should not be overturned even though the evidence offered by the defendant is in sharp conflict therewith and presents a substantial defense." Fuller v. State, 269 Ala. 312, 333, 113 So. 2d 153 (1959) , cert. denied, Fuller v. Alabama, 361 U.S. 936, 80 S. Ct. 380, 4 L. Ed. 2d 358 (1960).' Granger [v. State] , 473 So. 2d [1137,1 1139 [(Ala. Crim. App. 1985)].

• 'Circumstantial evidence alone is enough to support a guilty verdict of the most heinous crime, provided the jury believes beyond a reasonable doubt that the accused is guilty.' White v. State, 294 Ala. 265, 272, 314 So. 2d 857, cert. denied, 423 U.S. 951, 96 S.. Ct. 373, 46 L. Ed. 2d 288

(1975). 'Circumstantial evidence is in nowise considered inferior evidence and is entitled to the same weight as direct evidence provided it points to the guilt of the accused.' Cochran v. State, 500 So. 2d 1161, 1177 (Ala. Cr. App. 1984), affirmed in pertinent part, reversed in part on other grounds, Ex parte Cochran, 500 So. 2d 1179 (Ala. 1985)."

White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989). Finally,

> "' [c] ircumstantial evidence is not inferior evidence, and it will be given the same weight as direct evidence, if it, along with the other evidence, is susceptible of a reasonable inference pointing unequivocally to the defendant's guilt. Ward v. State, 557 So. 2d 848 (Ala. Cr. App. 1990). In reviewing a conviction based in whole or in part

> on circumstantial evidence, the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979).'
>
> "Ward, 610 So. 2d at 1191-92."

Lockhart v. State, 715 So. 2d 895, 899 (Ala. Crim. App. 1997) .

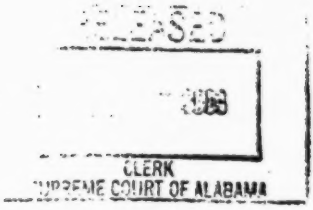
The State presented evidence that Mr. Brown agreed to give Demetrius money for the sole purpose of purchasing discounted civil judgments; that they agreed that Mrs. Brown would meet Demetrius at the bank on the morning of June 26, 1995, to set up a $50,000 account for Demetrius and his business, Executive Services; that, when Mrs. Brown arrived at the bank on June 26, 1995, Rosalyn was with Demetrius; that, after Mrs. Brown made the initial check payable to Executive Services, Demetrius told her that Executive Services did not have an account at that bank, but that his sister did; that Demetrius told Mrs. Brown that he wanted to deposit the initial check into Rosalyn's savings account and later transfer the money to Executive Services' account; that

Demetrius deposited the check after Mrs. Brown added Rosalyn as a payee; that Rosalyn's bank statement reflected a $50,000 deposit on June 26, 1995; that, on that same day, $27,122.60 was withdrawn from Rosalyn's account; that a $27,122.60 certified check dated June 26, 1995, was made payable to the Social Security Administration; that "Executive Services" and "R. McNish" appeared on the remitter line of the receipt; that Mr. Brown testified that he owed $27,122.60 to the Social Security Administration for the overpayment of Social Security benefits and that he had discussed this debt with Demetrius; that the Browns also signed and gave Demetrius 14 blank checks; that the amounts and payees on those checks were subsequently entered and the checks were presented for payment; that two of the checks were payable to Rosalyn McNish, and the signature "Rosalyn McNish" appeared on the back of the checks; that Mr. Brown received only $2,000 from Demetrius; that Demetrius gave Mr. Brown two checks that were written on Rosalyn's checking account and contained the signature "Rosalyn McNish;" that both checks were returned for nonsufficient funds; that Mr. Brown made several attempts to contact Demetrius after those checks were returned for nonsufficient funds, but Demetrius did not return his telephone calls; and that, when Mr. Brown went to the address Demetrius had given him for the business, that business was not at that address and none of the McNishes worked at that location. Based on this

evidence, the jury could have reasonably concluded that Rosalyn aided and abetted Demetrius in depriving the Browns of their property by deception and that she conspired with Demetrius to commit the crime of first-degree theft of property. Therefore, her argument is without merit. Accordingly, we affirm the trial court's judgment as to Rosalyn McNish.

AFFIRMED.

McMillan, P.J., and Cobb, Shaw, and Wise, JJ., concur.



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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2002-2003

1991233

Ex parte Rosalyn McNish

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Demetrius Antone McNish and Doris McNish
and Rosalyn McNish

v.

State of Alabama)

(Pike Circuit Court, CC-97-282, CC-97-283, CC-97-284,
and CC-97-285;
Court of Criminal Appeals, CR-98-0654)

JOHNSTONE, Justice.

Appendix C

The defendant Rosalyn McNish, her brother Demetrius McNish, and their mother Doris McNish were tried together on various theft, and conspiracy charges for their alleged involvement in taking money from two residents of Pike County, a married couple who had won fourteen million dollars in a Florida lottery. A jury found Rosalyn guilty of two counts of first-degree theft of property and two counts of conspiracy to commit first-degree theft of property. The trial court sentenced Rosalyn to five years in prison for each conviction and ordered the sentences for the conspiracy convictions to run concurrently with the sentences for the theft convictions.

Rosalyn appealed, and the Court of Criminal Appeals affirmed the judgment of

the trial court in a seventeen-page opinion addressing all three defendants' claims. McNish v. State, [Ms. CR-98-0654, February 4, 2000] _____ So. 2d_____ (Ala. Crim. App. 2000). The Court of Criminal Appeals also overruled Rosalyn's application for rehearing. Rosalyn then petitioned this Court for a writ of certiorari, which we granted to analyze, among other issues, whether Rosalyn preserved for review her challenge to the sufficiency of the evidence to support her convictions.

> At the close of the State's case, Rosalyn said:
>
> "I make a motion for a judgment of acquittal on the grounds that the State has not proven the case beyond a reasonable doubt; and also the prosecution has not proven venue in this case. It did not prove that the alleged offenses took place in Pike County."

(R. 270-71.) (Emphasis added.) The trial court denied the motion. At the close of all the evidence, Rosalyn filed in open court a written motion for a judgment of acquittal stating, "as grounds for said motion would show unto the court the evidence is insufficient to support a finding of quilt beyond a reasonable doubt to the charged offenses." (R. 27980, C.R. 3302. (Emphasis added.) The trial court again denied the motion.

The Court of Criminal Appeals held

that Rosalyn had not preserved for appellate review her challenge to the sufficiency of the evidence to support her convictions. The Court of Criminal Appeals recognized and analyzed the procedural facts of this issue this way:

> "At the close of the State's evidence, Rosalyn moved for a judgment of acquittal on the grounds that the State had not proved its case beyond a reasonable doubt and that the State had not proved venue. Rosalyn merely renewed her motion for a judgment of acquittal at the close of all of the evidence.

> Because Rosalyn did not allege in her motions for a judgment of acquittal that the State did not prove a prima facie case of theft and conspiracy, the motions did not squarely present to the trial court the issue of the sufficiency of the evidence; consequently, [they were] insufficient to preserve the issue for appellate review.' Johnson v. State, 500 So. 2d 69, 72 (Ala. Cr. App. 1986) (quoting Trone v. State, 366 So. 2d 379 (Ala. Cr. App. 1979)).[11]

McNish, So. 2d at _____ . (Emphasis added.)

In Ex parte Hall, [Ms. 1010415, April 19, 2002] So. 2d (Ala. 2002), this Court addressed a virtually identical preservation issue:

> "In his written motion for a judgment of acquittal, Hall stated as one of his grounds that 'insufficient evidence has been presented to support a finding that the defendant is guilty beyond a reasonable doubt.' This statement is almost identical to

the statement in Hanson [v. City of Trussville, 539 So. 2d 1082 (Ala. Crim. App. 1988)], that the city had not 'proven that [the defendant] is guilty of driving while suspended or revoked through the evidence.' Thus, although Hall's statement here, like the statement in Hanson, is not as perfectly phrased as the statement this Court endorsed in Ex parte Maxwell, [439 So. 2d 715, 716 (Ala. 1983), i.e., 'the prosecution has failed to make a prima facie case'], it was nevertheless 'sufficient ... to put the trial court on notice of a defect in the city's case, and, therefore, sufficient to preserve the issue for review.' Hanson, 539 So. 2d at 1084."

So. 2d at____ Judge Cobb aptly addressed the same issue in her special writing concurring in the result in Thomas v. State, 777 So..2d 317 (Ala. Crim. App. 2000):

> "The majority concludes that, because the defendant did not intone the mantra, 'The State has failed to prove a prima facie case,' the defendant's motion for a judgment of acquittal was not sufficient to preserve the issue for appellate review. I disagree. I see no appreciable difference between the words, 'The State has failed to prove a prima facie case,' and the defense counsel's words, 'The evidence is insufficient to convict my client and the State did not prove beyond a reasonable doubt that he is guilty....' I believe that the motion for a judgment of acquittal set out sufficient grounds to allow the trial court to make an informed decision on the motion. That

claim. We reverse the judgment

> of the Court of Criminal Appeals being the case, the language was sufficient to preserve the issue for appellate review."

777 So. 2d at 318. Thus, Rosalyn has preserved for appellate review her claim that the evidence was insufficient to support her convictions.

Therefore, the Court of Criminal Appeals erred in holding that Rosalyn did not preserve her challenge to the State's evidence and erred in not addressing the merits of Rosalyn's Appeals affirming Rosalyn's convictions, and we remand this cause for that court to address the merits of Rosalyn's claim

that the evidence was insufficient to support her convictions.

REVERSED AND REMANDED.

Houston, Lyons, Brown, Harwood, and Woodall, JJ., concur. Moore, C.J., concurs specially.

Stuart, J., concurs in part and dissents in part as to the rationale and concurs in the result.

MOORE, Chief Justice (concurring specially).

I agree with the Court's reversal of the Court of Criminal Appeals' judgment in this case because McNish's counsel undoubtedly preserved the issue of the sufficiency of the evidence through both

case beyond a reasonable doubt . Likewise,

the written oral and written objections. In the oral objection, made at the close of the State's case, McNish's counsel argued that "the State has not proven the

motion for a judgment of acquittal, made at the close of all the evidence, contended that "the evidence is insufficient to support a finding of guilt beyond a reasonable doubt." In my opinion, both of

those objections were sufficient to preserve for--appellate review the sufficiency-of-the-evidence issue.

The Court of Criminal Appeals seems to be making a distinction between sufficiency of the evidence as related to the State's prima facie case and sufficiency of the evidence to support a finding of a defendant's guilt beyond a reasonable doubt. "In proving a prima facie case in a criminal prosecution, all the State has done is fulfill its duty of proving the elements of the offense so that the jury may be allowed to consider the case." Eldridge v. State, 415

So. 2d 1190, 1194 (Ala. Crim. App. 1982). If the State fails to prove its prima facie case, then obviously it has not presented enough evidence to support a finding of guilt beyond a reasonable doubt. "Until the State proves, in the first instance, beyond a reasonable doubt, the facts which constitute the offense, the accused is not required to establish his innocence by exculpatory evidence." Segars v. State, 86 Ala. 59, 60, 5 So. 558 (1888) . That the State allegedly had not proven its case beyond a reasonable doubt is exactly the objection McNish's counsel made both at the close of the State's case and at the close of all the evidence. The objections were simply a more explicit way of stating that the State had not proven its prima facie case.

Therefore, the distinction made by the Court of Criminal Appeals in this case is a false one; McNish properly preserved the issue of the sufficiency of the evidence through her counsel's objection and her motion for a judgment of acquittal.

STUART, Justice (concurring in part and dissenting in part as to the rationale and concurring in the result).

I agree with the majority that the judgment of the Court of Criminal Appeals in this case must be reversed and the case remanded for the Court of Criminal Appeals to examine the sufficiency of the evidence to support Rosalyn McNish's conviction. The issue was preserved by Rosalyn's motion for a judgment of acquittal made at the close of all the evidence.

I, however, disagree with any inference in the majority opinion that Rosalyn's motion for a judgment of acquittal made at the close of the State's evidence preserved the issue for appellate review. At that time, Rosalyn moved for a

judgment of acquittal on the grounds that "the State has not proven the case beyond a reasonable doubt." This motion did not preserve a challenge to the sufficiency of the evidence. Specifically, this objection did not adequately advise the trial court that it needed to review the sufficiency of the evidence as to each element of the offenses charged to determine if it was necessary for the defense to present evidence in opposition. While I agree with the sentiment that it is not necessary to use the exact terminology "The State has failed to prove a prima facie case," I cannot agree that the vague and ambiguous

statement that "the State has not proven the case beyond a reasonable doubt" is adequate to place the trial court on notice of a challenge to the sufficiency of the evidence as to the charged offenses.

Rosalyn, however, adequately directed the trial court's attention to the sufficiency of the evidence of the charged offenses at the close of all the evidence, by stating: "[T]he evidence is insufficient to support a finding of guilt beyond a reasonable doubt to the charged offenses." That objection directed the trial court to consider the offenses charged in the indictment and to determine whether the evidence as to each element of the charged offenses was legally

sufficient to support a jury verdict as a matter of law. That objection preserved Rosalyn's challenge to the sufficiency of the evidence.

> "'Specific objections or motions are generally necessary before the ruling of the trial judge is subject to review ....'
>
> The purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury."

Ex parte Works, 640 So. 2d 1056, 1058 (Ala. 1994).

While a motion for a judgment of acquittal need not contain the specific phrase "prima facie case," it does need to adequately 'direct the trial court's attention to the evidence to allow an informed decision on the motion.

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1999-2000

CR-98-0654

Demetrius Antone McNish, Doris McNish, and Rosalyn McNish

v.

State

Appeal from Pike Circuit Court
(CC-97-246, CC-97-247, CC-97-248, CC-97-249, CC-97-250, CC-97-251, CC-97-252, CC-97-253, CC-97-255, CC-97-256, CC-97-257, CC-97-258, CC-97-259, CC-97-260, CC-97-261, CC-97-262, CC-97-263, CC-97-264, CC-97-265, CC-97-266, CC-97-267, CC-97-288, CC-97-289, CC-97-290, CC-97-291, CC-97-292, CC-97-293; CC-97-268, CC-97-269, CC-97-270, CC-97-271, CC-97-272, CC-97-273, CC-97-274, CC-97-275, CC-97-276; CC-97-277, CC-97-278, CC-97-279, CC-97-280, CC-97-281; CC-97-282, CC-97-283, CC-97-284, and CC-97-285)

BASCHAB, JUDGE.

Demetrius McNish was convicted of 13 counts of first-degree theft of property, violations of §13A-8-3, Ala. Code 1975 (cases CC-97-247, CC-97-249, CC-97-251, CC-97-253, CC-97-257, CC-97-259,

Appendix D

CC-97-261, CC-97-263, CC-97-265, CC-97-267, CC-97-289, CC-97-291, and CC-97-293); 13 counts of conspiracy to commit first-degree theft of property, violations of §§13A-4-3 and 13A-8-3, Ala. Code 1975 (cases CC-97-246, CC-97-248, CC-97-250, CC-97-252, CC-97-256, CC-97-258, CC-97-260, CC-97-262, CC-97-264, CC-97-266, CC-97-288, CC-97-290, and CC-97-292); and one count of second-degree theft of property, a violation of §13A-8-4, Ala. Code 1975 (case CC-97-255). The trial court sentenced him to serve ten years in prison on each of the first-degree theft convictions and five years in prison on each of the conspiracy convictions and the second-degree theft conviction.'

Doris McNish was convicted of seven counts of first-degree

theft of property, violations of §13A-8-3, Ala. Code 1975 (cases CC-97-269, CC-97-271, CC-97-273, CC-97-275, CC-97-277, CC-97-279, and CC-97-281); and seven counts of conspiracy to commit first degree theft of property, violations of §§13A-4-3 and 13A-8-3, Ala. Code 1975 (cases CC-97-268, CC-97-270, CC-97-272, CC-97-274, CC-57-276, CC-97-278, and CC-97-280). The trial court sentenced her to serve five years in prison for each of her convictions.[1]

Rosalyn McNish was convicted of two counts of first-degree theft of property, violations of §13A-8-3, Ala. Code 1975 (cases CC-97-283 and CC-97-285); and two counts of conspiracy to commit first-degree theft of property, violations of §§13A-4-3 and 13A-83,

---

[1]The trial court ordered him to serve his sentences as follows:

> "Case Nos. CC-97-246 and -247 to run concurrently, Case Nos. CC-97-248 and -249 to run concurrently, Case Nos. CC-97-250 and -251 to run concurrently, Case Nos. CC-97-252 and -253 to run concurrently, Case Nos. CC-97-256 and -257 to run concurrently, Case Nos. CC-97-258 and -259 to run concurrently, Case Nos. CC-97-260 and -261 to run concurrently, Case Nos. CC-97-262 and -263 to run concurrently, Case Nos. CC-97-264 and -265 to run concurrently, Case Nos. CC-97-266 and -267 to run concurrently, Case Nos. CC-97-288 and -289 to run concurrently, Case Nos. CC-97-290 and -291 to run concurrently, and Case Nos. CC-97-292 and -293 to run concurrently, but otherwise consecutively."

(C.R. 162-63.)

Ala. Code 1975 (cases CC-97-282 and CC-97-284). The trial court sentenced her to serve five years in prison for each conviction.'

In June 1995, Willie Joe Brown, a resident of Pike County, Alabama, won $14,000,000 in the Florida lottery. Shortly thereafter, Demetrius telephoned Mr. Brown's home and talked to Stephanie Brown, Mr. Brown's wife. Demetrius told her that he represented "a lot" of lottery winners all over the county and that he thought he could help Mr. Brown manage his winnings to earn more money. Mrs. Brown spoke to

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[2]The trial court ordered Doris to serve her sentences as follows:

> "Case Nos. CC-97-268 and -269 to run concurrently, Case Nos. CC-97-270 and -271 to run concurrently, Case Nos. CC-97-272 and -273 to run concurrently, Case Nos. CC-97274 and -275 to run concurrently, Case Nos. CC-97-276 and -277 to run concurrently, Case Nos. CC-97-278 and -279 to run concurrently, and Case Nos. CC-97-280 and -281 to run concurrently, but otherwise consecutively."

[3]The trial court ordered her to serve her sentences as follows: "Case Nos. CC-97-282 and -283 to run concurrently and Case Nos. CC-97-284 and -285 to run concurrently, but otherwise consecutively." (C.R. 3321.)

Demetrius on the telephone on several occasions. On one occasion, he told her that he would be in the area where they lived and asked if he could come to their home. The Browns agreed, and Demetrius went to their house on June 25, 1995. Demetrius told the Browns that he was a consultant, and he gave them his business card. He also showed them newspaper clippings from when he had run for public office. Mr. Brown testified that he and Demetrius discussed a business venture by which Mr. Brown would give Demetrius money to purchase discounted civil judgments. Mr. Brown agreed to the venture and arranged for Mrs. Brown to meet Demetrius the following morning to set up a $50,000 account for Demetrius and his business, Executive Services. When Mrs. Brown arrived at the First

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Alabama Bank in Troy, Alabama, the following morning, Demetrius was there with his sister, Rosalyn. After Mrs. Brown had written the $50,000 check to Executive Services, Demetrius explained that Executive Services did not have an account at that bank, but his sister did. Therefore, he wanted to deposit the money into Rosalyn's savings account and later transfer the money to Executive Services' account. Mrs. Brown added Rosalyn as a payee, and Demetrius deposited the check. On that same day, $27,122.60 was withdrawn from Rosalyn's account. The [illegible] produced a receipt for a $2[illegible] certified check dated June 26, 1995, that was made payable to the Social Security Administration. "Executive Services" and "R. McNish" appeared on the remitter line of the receipt. Mr. Brown

testified that he owed

$27,122.60 to the Social Security Administration for the overpayment of Social Security benefits and that he had discussed this debt with Demetrius.

The Browns gave Demetrius 14 checks in addition to the initial $50,000 check.' The total amount of those checks was $218,400. Either Mr. Brown or Mrs. Brown identified their signature on each check. Both testified that the date, payee, amount, and memorandum lines were blank when they gave those checks to Demetrius. Two of the checks were payable to Rosalyn McNish, and the signature "Rosalyn McNish" appeared on the back of the check. Seven of the checks were made out to Doris McNish, Demetrius' and Rosalyn's mother,

and the signature "Doris McNish" appeared on the back of the checks. Four of the checks were payable to Demetrius McNish, and the final check was payable to "Cash." The signature "Demetrius McNish" appeared on the back of these checks. One of the checks was dated May 20, 1995. However, Mrs. Brown testified that neither she nor her husband had a checking account before he won the lottery in June 1995.

The memorandum lines on two of the checks contained language indicating that the money was a loan. However, Mr. Brown denied that he had agreed to loan Demetrius money to use for personal and business expenses. Rather, he testified that the money from the checks was to be used solely for purchasing judgments. Mr. Brown

testified that he never received any judgments from Demetrius and that Demetrius did not give him any proceeds from any judgments. He testified that he did receive two $1,000 cashier's checks from Demetrius, but he did not know what the money was for. Mr. Brown also received two checks from Demetrius that were written on Rosalyn's checking account and contained the signature "Rosalyn McNish." Both checks contained notations on the memorandum line that they were loan payments and both were returned for nonsufficient funds. Mr. Brown also received two checks that were written on the account of Cecilia A. Primm and contained the notation "loan payment" on the

---

[1]None of the appellants were charged with taking the $50,000 from the initial check.

memorandum lines. However, Mr. Brown testified that he did not know Cecilia Primm and he had not loaned her any money. Both checks were returned because the account was closed. There was also testimony that Demetrius assisted the Browns in paying off existing bills and was involved in the purchase of their new home and automobile insurance. However, the extent of Demetrius' involvement in these transactions was not clear.

Mr. Brown telephoned Demetrius when did not receive any money from him. He testified that he called Demetrius three or four times and left messages on Demetrius' voice mail. He also gave Demetrius the telephone number for his beeper, which had a tollfree telephone number and voice mail.

Nevertheless, Demetrius never returned his telephone calls. Mr. Brown then went to Mobile to find Demetrius' office. He found the address where Demetrius

had told him the business was located, but there was no such business there. Instead, he found a building attached to a hotel or a motel, but none of the McNishes worked there. Mr. Brown also went to Prichard to look for Demetrius. While there, he talked with Doris and told her that Demetrius was going to get into trouble over the checks. According to Brown, he was talking about the checks written on Rosalyn's account that had been returned for nonsufficient funds.

Mrs. Brown testified that, although her husband told her something about Demetrius using the

money to buy judgments, she was not familiar with the terms of the agreement between him and Demetrius. Mrs. Brown also testified that she accompanied Demetrius to the bank on several occasions and gave him checks as her husband directed.

I.

Rosalyn argues that her trial counsel rendered ineffective assistance. (Issue I in Rosalyn's brief to this court.) To prevail on an ineffective-assistance-of-counsel claim, an appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced her. See Strickland v. Washington, 466,U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Brown v. State, 663 So.2d 1028, 1032 (Ala. Cr. App. 1995). In

her motion for a new trial, Rosalyn merely alleged that her trial counsel rendered ineffective assistance because the trial court denied her motion for a continuance.[5] She did not point to any specific instances that she alleged constituted deficient performance, nor did she show how more time to prepare would have affected her attorney's performance. Thus, Rosalyn has not satisfied her burden of proof under Strickland, and is not entitled to relief on this claim.

II.

Rosalyn also argues that the trial court erred when it did not grant a mistrial due to Mrs. Brown's contact with a member of the jury.[6] (Issue II in Rosalyn's brief to this court.) After a recess in the

trial, Demetrius' attorney moved for a mistrial because Mrs. Brown had had contact with a juror during the recess. However, Rosalyn did not join in Demetrius' objection, and "[n]othing in the record indicates that the judge made a practice of treating an objection by one of the three defendants' counsel as being made by all three defendants." T. R. D. v. State, 673 So.2d 838, 844 (Ala. Cr. App. 1995). Accordingly, she did not preserve this issue for our review.

'Rosalyn also appears to argue that her trial counsel rendered ineffective assistance because the State did not provide timely discovery. However, she did not raise this claim in her motion for a new trial. Therefore, she did not properly preserve this issue for our review. See Marshall v. State, 629 So.2d 766 (Ala. Cr. App. 1993).

[6]Additional ,ly, Rosalyn appears to argue that the trial court erroneously allowed the jury to

III.

Rosalyn further argues that the trial court erred in admitting the cancelled checks into evidence because the State allegedly did not establish aa proper predicate and chain of custody for those checks. (Issue IV in Rosalyn's brief to this court.) At trial, Doris' attorney objected to the admission of the checks on improper predicate and chain-of-custody grounds. However, Rosalyn did not join in this objection. Therefore, she did not preserve this issue for our review. See T. R. D., supra.

IV.

Next, Rosalyn argues that the trial court improperly instructed

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separate. Because she did not present this argument to the trial court, she did not preserve it for our review. See McCollum v. State, 678 So.2d 1210 (Ala. Cr. App. 1995).

the jury on a defendant's right not to testify. (Issue VI in Rosalyn' s brief to this court.) "No party may assign as error the court's . . giving of an erroneous, misleading, incomplete, or otherwise improper oral charge, unless the party objects thereto before the jury retires to consider its verdict, stating the matter to which he or she objects and the grounds of the objection." Rule 21.3, Ala. R. Crim. P.; see also McCollum v. State, 678 So. 2d 1210 (Ala. Cr. App. 1995). Rosalyn did not object to the trial court's instruction on a defendant's right not to testify. Rather, she stated that she was satisfied with the trial court's instructions. Therefore, this issue is not properly before this court.

V.

Demetrius and Rosalyn argue that there was a fatal variance between the allegations contained in the theft indictments and the evidence presented at trial. (Issue I in Demetrius' brief to this court and Issue V in Rosalyn's brief to this court.) This issue is not properly before this court. After the trial court instructed the jury, Doris amended her motion for a judgment of acquittal to include, as a ground the allegation that a material variance existed. Neither Demetrius nor Rosalyn joined in this objection. Therefore, they did not properly preserve this issue for our review. See Biles v. State, 715 So.2d 878 (Ala. Cr. App. 1997) (holding that issues relating to a variance between the allegations contained in an indictment and the

proof presented at trial must first be raised in the trial court); T. R. D., supra.

VI.

Demetrius argues that the trial court erred in instructing the jury on both first-degree theft and conspiracy because the conspiracy charges arose from the same facts or course of conduct as the first-degree theft charges. (Issue II in Demetrius' brief to this court.) To the extent that Demetrius is arguing that the trial court improperly instructed the jury, he did not preserve this issue for our review. At trial, Demetrius did not object to the trial court's instructions. Therefore, he did not properly preserve this issue for our review. See Rule 21.3, Ala. R. Crim. P.; McCollum, supra. To the

extent that Demetrius is arguing that he was improperly convicted of both first-degree theft and

conspiracy, this issue is not properly before this court. During the charge conference, Demetrius' counsel stated, "I believe he can be found guilty of conspiracy and theft." (R. 339.) "'A party cannot assume inconsistent positions in the trial and appellate courts and, as a general rule, will not be permitted to allege an error in the trial court proceedings which was invited by him or was a natural consequence of his own actions."' Miller v. State, 668 So.2d 912, 916 (Ala. Cr. App. 1995) (quoting Hammers v. State, 661 So. 2d 788 (Ala. Cr. App. 1994) Because Demetrius attempts to

assert a position that is not consistent with his position at trial, this issue is not properly before this court.

VII.

Demetrius also argues that, even though the trial court ordered that he serve the sentences for the conspiracy convictions concurrently with his sentences for the corresponding theft convictions, his sentences for both conspiracy and first-degree theft amount to multiple punishments for the same offense. (Issue IV in Demetrius' brief to this court.) However, Demetrius' argument is based on the assertion that, under the facts of this case, he could not be convicted of both theft and conspiracy. As we noted in Part VI of this opinion, this position is not consistent with his position at trial. See Miller, supra. Therefore,

this issue is not properly before this court.

Demetrius further argues that he should not have been convicted of multiple counts of conspiracy and theft because the evidence, at most, supported only one conviction for conspiracy and one conviction for theft. (Issues III and V in Demetrius' brief to this court.) However, he did not raise this issue before the trial court. Accordingly, he did not properly preserve it for our review. See Harris v. State, 563 So.2d 9, 10-11 (Ala. Cr. App. 1989) (holding that the appellant waived a claim that his multiple convictions for child pornography arising from the same course of conduct violated double jeopardy principles).

Demetrius also argues that the trial court erred in charging the

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jury on 14 counts of theft. However, because he did not object to the trial court's instructions, he did not preserve this issue for our review. See Rule 21.3, Ala. R. Crim. P.; McCollum, supra.

Ix.

Rosalyn finally argues that the trial court erred in denying her motions for a judgment of acquittal because the State allegedly did not present sufficient evidence to s[illegible]rt her convictions. (Issue II in [illegible]salyn's brief to this court.) However, she did not properly preserve this issue for our review. At the close of the State's evidence, Rosalyn moved for a judgment of acquittal on the grounds that the State had not proved its case beyond a reasonable doubt and that the State had not proved venue. Rosalyn

merely renewed her motion for a Judgment of acquittal at the close of all of the evidence.

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> "The issue of the sufficiency of the evidence is preserved for review by a defendant's motion for a judgment of acquittal that is entered at the end of the state's case, at the close of the evidence, see A.R.Cr.P. 20(a), or after the verdict is entered, see A.R. Cr.P. 20.3. The motion must state the ground that the state failed to prove a prima facie case. See, e.g., Ex parte Maxwell, 439 So.2d 715 (Ala. 1983). A defendant may also challenge the sufficiency of the evidence when moving for a new trial under A.R.Cr.P. 24.1 or when moving for an arrest of judgment under A.R.Cr.P. 24.2. A.R.Cr.P. 20.3(c); see Pearson, 601 So.2d at 1123-24; Prather v. City of Hoover, 585 So.2d 257, 258 n.1 (Ala. Cr. App. 1991).[11]

Zumbado v. State, 615 So.2d 1223, 1241 (Ala. Cr. App. 1993) (emphasis added). Because Rosalyn did not allege in her motions for a judgment of acquittal that the State did not prove a prima facie case of theft and conspiracy, the motions did "not squarely present to the trial court

the issue of the sufficiency of the evidence; consequently, [they were] insufficient to preserve the issue for appellate review." Johnson v. State, 500 So.2d 69, 72 (Ala. Cr. App. 1986) (quoting Trone v. State,, 366 So.2d 379 (Ala. Cr. App. 1979)). Furthermore, Rosalyn did not specifically challenge the sufficiency of the evidence in her motion for a new trial. See Johnson, supra. Therefore, she did not properly preserve this issue for our review.

X.

Demetrius finally argues that the evidence was not sufficient to support his theft convictions. (Issue VI in Demetrius' brief to this court.) Specifically, he argues that the State did not prove that he intended to deprive the Browns of

their property and that, at the time he entered into the agreement with Mr. Brown, he did

not intend to perform as promised. When reviewing the sufficiency of the evidence, we must view the evidence in a light most favorable to the State and determine whether there was evidence from which the jury, by fair inference, could conclude that the appellant was guilty beyond a reasonable doubt. See Hale v. State, 654 So.2d 83 (Ala. Cr. App. 1994).

Section 13A-8-3 (a) , Ala. Code 1975, defines first-degree theft of property as the "theft of property

which exceeds $1,000.00 in value." Section 13A-8-4(a), Ala. Code 1975, defines second-degree theft of property as " [t] he theft of property which exceeds $250.00 in value but does not exceed $1,000.00 in value, and which is not taken from the person of another."

> "A person commits the crime of theft of property if he:
>
> > "(2) Knowingly obtains by deception control over the property of another, with intent to deprive the owner of his property."

§13A-8-2, Ala. Code 1975.

> "'In a theft trial, intent is a question for the jury.' Seaton v. State, 645 So.2d 341, 343 (Ala. Cr. App. 1994). 'Intent, ... being a state or condition of the mind, is rarely, if ever, susceptible

> of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence.' McCord v. State, 501 So.2d 520, 528-529 (Ala. Cr. App. 1986), quoting Pumphrev v. State, 156 Ala. 103, 47 So. 156 (1908)."

French v. State,, 687 So.2d 202, 204 (Ala. Cr. App. 1995), rev'd on other grounds, 687 So.2d 205 (Ala. 1996).

The State presented evidence that Mr. Brown agreed to give the appellant money for the sole purpose of purchasing; discounted civil judgments. The Browns signed and gave Demetrius 14 blank checks. The amounts and payees on those checks were subsequently entered and the checks were presented for payment. The amounts of the checks totaled $218,400. Mr. Brown testified that he received only $2,000 from Demetrius.

He testified that two other checks Demetrius gave him were returned for nonsufficient funds. Although Mr. Brown made several attempts to contact Demetrius after those checks were returned for nonsufficient funds, Demetrius did not return his telephone calls. When he went to the address Demetrius had given him for the business, that business was not at that address and none of the McNishes worked at that location. Accordingly, the State presented sufficient evidence from which the jury could have concluded that Demetrius intended to deprive the Browns of their property and that he did not intend to comply with the terms of the agreement at the time he entered into the agreement. Furthermore, any evidence of services that

Demetrius may have provided to the Browns merely created a conflict in the evidence that also presented a question for the jury to decide. See Bennett v. State, 584 So.2d 869, 871 (Ala. Cr. App. 1990) (holding that "[clonflicting evidence presents a question for the jury, and a verdict rendered on conflicting evidence will not be disturbed on appeal"). Therefore, Demetrius' argument is without merit.

XI.

Finally, Doris argues that the State did not present sufficient evidence to support her convictions for conspiracy and theft. (Issue IV in Doris' brief to this court.) Mr. Brown testified that he had met Doris on two occasions and that they just spoke and were friendly. He testified that Doris never made any representations to him. He also testified that Demetrius never discussed Doris working with him. Mrs. Brown testified that she had never met Doris and that she had seen her only once in a limousine with Demetrius when he had come to her house to see Mr. Brown. Mrs. Brown also testified that Doris never made any representations to her. The State presented seven checks that showed Doris McNish as the payee and that were signed "Doris McNish." However, the State did not present any evidence that Doris ever had any knowledge of the checks or that Doris actually

signed the checks. A bank statement for a savings account owned by Doris and Rosalyn reflected deposits with dates and amounts that corresponded to the dates and amounts on some of the checks that the Browns had given Demetrius. However, nothing showed that Doris had any knowledge that the money was being deposited into the account or that she withdrew any of those funds. Therefore, the State did not present sufficient evidence to support Doris' theft and conspiracy convictions. See Stinson v. State, 631 So.2d 831 (Ala. 1992) ; Greer v. State, 563 So.2d 39 (Ala. Cr. App. 1990).

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Accordingly, we must reverse Doris' convictions and sentences and render a judgment in her favor.'

For the foregoing reasons, we affirm the trial court's judgment as to Demetrius McNish and Rosalyn McNish. However, we reverse the trial court's judgment as to Doris McNish and render a judgment in her favor.

CONVICTIONS AND SENTENCES OF DEMETRIUS MCNISH AND ROSALYN MCNISH AFFIRMED; CONVICTIONS AND SENTENCES OF DORIS MCNISH REVERSED AND JUDGMENT RENDERED.

Long, P.J., and McMillan, Cobb, and Fry, JJ., concur.

'Based on our decision, we need not address